



15  
Office - Supreme Court, U. S.

FILED

APR 19 1945

CHARLES ELMORE GROFFLEY  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 1036.

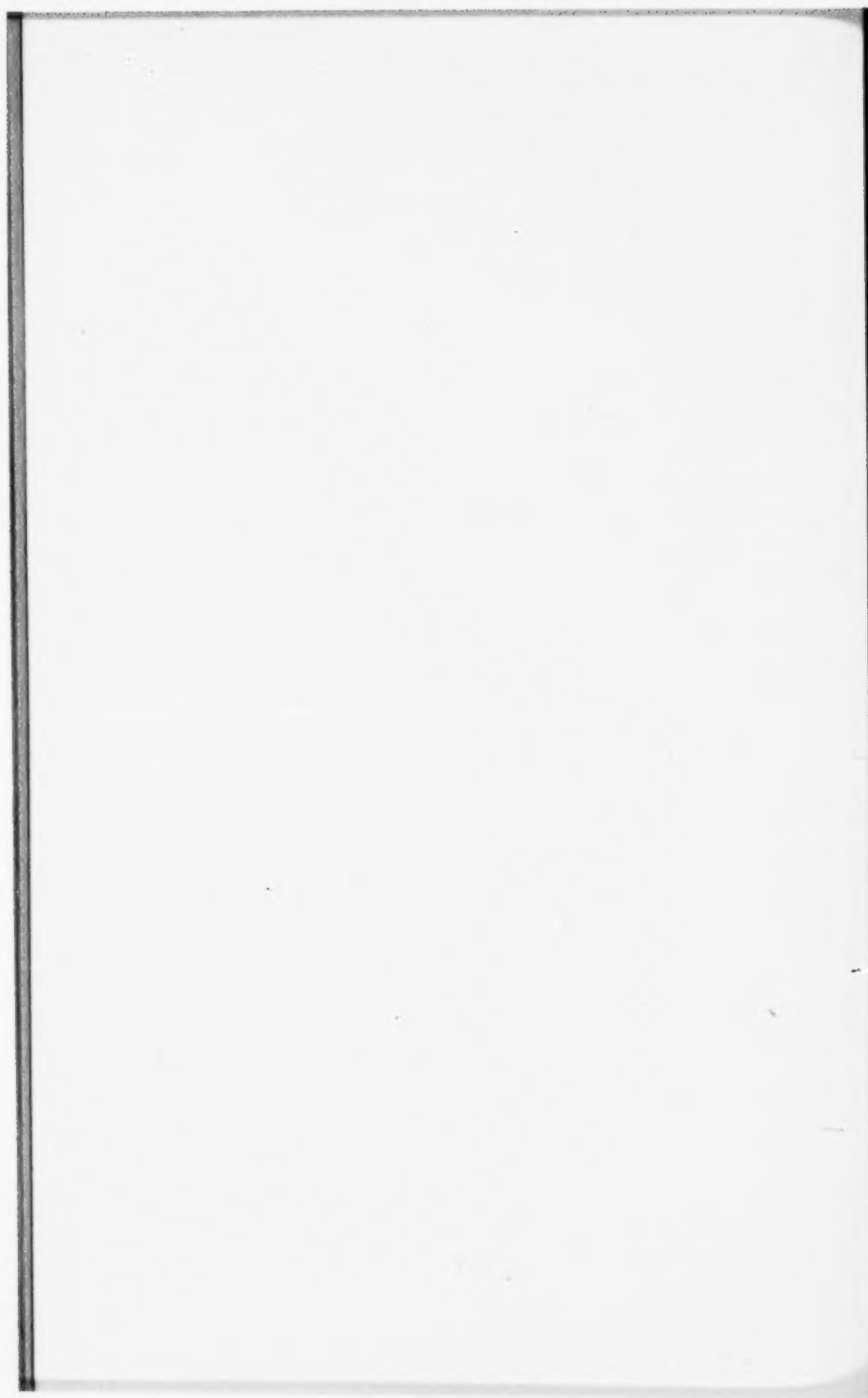
THE STATE OF OHIO, *ex rel.*, HUGH M. FOSTER,  
A Taxpayer,  
*Petitioner,*

vs.

WILLIAM S. EVATT,  
Tax Commissioner of Ohio,  
*Respondent.*

## REPLY BRIEF OF PETITIONER.

MATTHEW L. BIGGER,  
50 East Broad Street,  
Columbus, Ohio,  
*Attorney for Petitioner.*



## INDEX.

---

1. "The Parties in the Case Below Waived Any Claim of Disqualification of Judge Turner at the Time of Hearing" .....	1
2. Was the Interest of Judge Turner Such as to Disqualify Him? .....	3
3. Did Judge Turner Owe a Duty to Participate in the Decision in the Instant Case?.....	6
4. Was There Error in the Decision of the Court Below? .....	9

## TABLE OF AUTHORITIES.

---

### Cases.

<i>Foreman vs. Mariana</i> , 43 Ark. 324.....	4
<i>Ex parte Harris</i> , 26 Fla. 77.....	4
<i>Love vs. Wilcox</i> , 119 Tex. 256.....	4
<i>Metsker vs. Whitsell</i> , 181 Ind. 126.....	4
<i>Sioux City vs. Western Asphalt Paving Corp.</i> , 223 Iowa 279.....	4
<i>State ex rel. Foster vs. Miller</i> , 136 O. S. 295.....	10
<i>State ex rel. Mitchell vs. Sage Stores</i> , 157 Kans. 622..	6
<i>State ex rel. Seiders vs. Bangor</i> , 98 Me. 114.....	4
<i>Tari vs. State</i> , 117 O. S. 48.....	1
<i>Truax vs. Corrigan</i> , 257 U. S. 312.....	12
<i>United States vs. Pendergast</i> , 34 Fed. Sup. 269.....	6

### Text.

30 <i>Am. Jur.</i> 800, "Judges" Sections 94 and 95.....	2
--	---

**Statutes.**

**Ohio General Code:**

Section 5546-5 .....	9
Section 5546-9a .....	9

**Constitution.**

**U. S. Constitution:**

14th Amendment .....	11
----------------------	----

# In the Supreme Court of the United States

OCTOBER TERM 1944.

**No. 1036.**

---

THE STATE OF OHIO, *ex rel.*, HUGH M. FOSTER,  
A Taxpayer,  
*Petitioner,*

vs.

WILLIAM S. EVATT,  
Tax Commissioner of Ohio,  
*Respondent.*

---

## **REPLY BRIEF OF PETITIONER.**

---

We will endeavor to be brief in submitting this reply brief.

We will take up the respondent's brief and discuss the several subjects in the same order that respondent has discussed them.

1. **"THE PARTIES IN THE CASE BELOW WAIVED ANY CLAIM OF DISQUALIFICATION OF JUDGE TURNER AT THE TIME OF HEARING."**

The first case cited is that of *Tari vs. State*, 117 O. S. 48. By referring to that portion of the opinion of Chief Justice Marshall at page 496 of the opinion found on page 8 of their brief, it will be observed that the legal proposition stated was qualified by the words "and not affecting public policy." It was emphasized in that case that the disqualification was personal to complaining party.

In the *Tari* case the judgment affected only an individual who was charged with a misdemeanor and it did not in any sense affect public policy.

(The emphasis throughout is ours.)

At page 9 of respondent's brief they have quoted from 30 *Am. Jur.* 800, "Judges" Section 95. *That section is limited to disqualification relating to personal privilege and where they are subject to waiver.* In Section 95 there is a reference to a footnote which points to Section 94, which Section 94 relates to matters of public policy. We quote from Section 94 as follows:

"In the absence of a controlling statute on the subject, this is generally held to be true in respect to any disqualification which is regarded as a matter of personal privilege and is not based on public policy. \* \* \* On this theory some courts held that an objection that a judge is disqualified because of some interest or a bias or prejudice may be waived or that one may by his conduct estop himself from interposing an objection, but where the disqualification is deemed to be based on reasons of public policy, it cannot be waived and for this reason it has been held that disqualification on the ground of relationship or interest cannot be waived."

We have examined the other citations at page 9 of their brief but inasmuch as counsel has not quoted from them or pointed out any particular pertinency, and we do not find any particular pertinency, we do not feel called upon to further discuss them.

It has been held by all authorities on the question that where an interest in the conclusions to be reached, or the result obtained is pecuniary—that the interest thus arising creates a disqualification—based on the maxim that a judge cannot sit in his own cause; that such disqualification is founded upon public policy; that where the disqualification is founded upon public policy or exists because the action is prohibited by constitution, or statute, it cannot be waived; and if founded on public policy, it cannot be waived because expressly prohibited, that then the judgment is void.

Referring to the comments of opposing counsel at pages 9 and 10, it is conceded that the occurrences at the

hearing in the Supreme Court were in part as outlined by opposing counsel, but it is only fair to say that counsel signing this brief was at all times the principal counsel in the case and had no knowledge of the colloquy between the court and counsel until after that date. It is not conceded that Mr. I. B. Hart, who was assistant counsel, expressly waived his objection at the time of the hearing. It is not even claimed that the inquiry was made of the *relator* as to whether or not he was willing for Judge Turner to participate, but even if inquiry had been made of relator, he would have had no power to waive the rights of the State of Ohio, millions of taxpayers in Ohio who were paying sales taxes. The sales tax reached every man, woman and child in the State of Ohio and their rights could not be so easily transgressed, neither could the relator have waived them.

This Court will no doubt wonder why Mr. I. B. Hart does not join in this appeal. It is therefore pertinent to explain that Mr. Hart is a son of Judge William L. Hart of the Ohio Supreme Court and obviously it would have been embarrassing to him to participate in this appeal, and inasmuch as there was no real necessity for his further participation, he elected to withdraw. Concerning Mr. Hart, we refer the Court to the affidavit found at page 945 of the record.

## **2. WAS THE INTEREST OF JUDGE TURNER SUCH AS TO DISQUALIFY HIM?**

In our original Petition and Brief at pages 27, 28, and 41 to 50 inclusive, we cited, quoted and discussed a large number of cases which were certainly exactly in point and the principles declared in those cases are certainly decisive of the question of Judge Turner's disqualification. It is noteworthy that opposing counsel has not attempted to distinguish those cases and has not attempted to show their inapplicability. On the contrary at page 11 of the

respondent's brief, we find six cases cited on the theory of Judge Turner's disqualification. We have examined every one of those cases, and we are prepared to show that they are not applicable to the facts of this present appeal.

The case of *Love vs. Wilcox*, 119 Tex. 256, decided that the interest must be direct and immediate, not remote or contingent, and that the interest must "occur on the result of the suit." Judge Turner's interest did arise as a result of the suit, and it is conceded that his rental was increased by his getting a percentage of the taxes which were illegally retained by the Kroger Company.

The case of *Sioux City vs. Western Asphalt Paving Corp.*, 223 Iowa 279, decides that the interest must be "some direct pecuniary gain or property, and has no reference to the remote interest which he along with every other citizen or taxpayer of a city might have in the result of a judgment against the city."

The case of *State ex rel. Seiders vs. Bangor*, 98 Me. 114 was parallel on its facts to the *Sioux City* case and involved the interest of a taxpayer.

The case of *Foreman vs. Mariana*, 43 Ark. 324, involved the interest which every citizen must feel in public proceedings or public measures and did not involve any pecuniary or property interests. The result of the suit in that case would not have affected the judge differently from its effect upon every other citizen.

In the case of *Ex parte Harris*, 26 Fla. 77, the judge was a brother-in-law of one of the parties and the holding in that case was that a feeling of sympathy would not disqualify a judge even though it might be such as would disqualify a juror.

The case of *Metsker vs. Whitsell*, 181 Ind. 126, more properly belongs to the third subject of discussion in respondent's brief, but it is sufficient to say that that case does hold that "the direct, pecuniary interest of a judge in the result of the litigation furnishes a sufficient ground

for his recusal regardless whether such interest is great or small."

That case further holds that the judge should not be held to be disqualified if he is the only tribunal for hearing the matter in issue. We shall discuss this latter proposition later in this brief.

Opposing counsel attempt to show that Judge Turner was not financially benefited. It is stated that in addition to the "flat" rental, that Judge Turner received a percentage of the gross sales of the Kroger Company. It is incorrect to call it a "flat" rental. Judge Turner's affidavit states "The 1935 lease rental was based upon a percentage of sales." (Rec. p. 921.)

Opposing counsel overlook the fact which is clearly shown by the record that the Kroger Company kept no separate account of the monies collected from customers on account of sales tax but that the same were mingled with the receipts from sales. Judge Turner therefore received 5 per cent of whatever was withheld by the Kroger Company in its accounting with the State of Ohio. This is undenied and undeniable. Opposing counsel overlook the further fact that whatever settlement may have been made between Judge Turner and the Kroger Company for the year 1935, it must be very clear that in the absence of a showing that the Kroger Company had made an honest accounting in the years subsequent to 1935 that Judge Turner has benefited in each of those subsequent years, and it is also painfully apparent that Judge Turner's decision will leave the state without remedy to inquire into those subsequent years.

This is a complete answer to the highly technical arguments made by opposing counsel in summarizing the arguments at page 6 and again in elaborating their arguments at page 12.

Even for the year 1935 the settlement referred to does not change the situation in the slightest. The statement concerning that settlement would at most only show that

Judge Turner received improvements to his property instead of actual cash.

**3. DID JUDGE TURNER OWE A DUTY TO PARTICIPATE IN THE DECISION IN THE INSTANT CASE?**

Opposing counsel claim that he did owe such a duty and in support of that claim cite *United States vs. Pendergast*, 34 Fed. Sup. 269. In the famous Pendergast trial, Pendergast alleged disqualification merely because he preferred some other judge. Surely everyone would concede that Judge Otis owed no duty to step aside on that ground only. The Court said a Judge should not step aside merely because some one wants him to. There was no pecuniary interest alleged or involved.

The case of *State ex rel. Mitchell vs. Sage Stores*, 157 Kans. 622, is equally foreign to our present controversy. It appears from the quotation at page 13 of their brief that there was no disqualification, merely a preference not to participate. We submit that neither of the foregoing cases should have any effect upon this appeal.

Referring to the comments of opposing counsel at page 14, it is certainly out of place to refer to the situation of Judge Zimmerman. It is claimed that Judge Zimmerman's father was the owner of a property rented for commercial purpose, and that the same disqualification would apply to him as applies to Judge Turner. We know nothing about the circumstances of that particular tenancy except as has been stated by opposing counsel. It does not appear that Judge Zimmerman himself had any interest whatever in the property. Neither does it appear that it was of such a character that the tenant could escape the collection and payment of lawful sales taxes. There certainly is no claim that the tenant is charged with such illegal retention of taxes. We think the discussion of Judge Zimmerman is entirely out of place in this litigation.

Counsel further stated:

"It could well be probable that some of the other members of the court were lessors of real property to lessees who were vendors of personal property at retail \* \* \*"

Based upon this violent assumption, counsel state that such "lessees necessarily would have been affected by the decision of the case below if they were in business during the year 1935." This assumes that all of the retail merchants in Ohio were guilty of fraud in the collection and return of sales taxes. We think it is clear from the printed record in this case that it was not possible to defraud the State of Ohio except by the expedient of refusing to keep records of sales, and it is not claimed that there was such fraudulent conduct on the part of anyone except certain classes of chain stores and department stores.

It must be borne in mind that the Supreme Court of Ohio was considering ~~an appeal from a trial court~~. Neither the Constitution of the United States nor the Constitution of the State of Ohio guarantee a review of the decision of the trial court. It is only guaranteed to litigants that their controversies may be submitted to a court of justice. There was a full trial and as we think a fair trial by the Court of Appeals in Ohio, and there was a decision and as we think ~~a correct decision of that controversy~~ by that trial court. Even if there was any foundation for the claim that Judge Turner's retirement would have prevented a review, it would be no ground for submitting to a decision at the hands of a disqualified court arising out of a pecuniary interest opposed by public policy.

It is at best a labored and strained argument that opposing counsel make as to the necessity of Judge Turner's presence in order to render a decision.

What the respondent really means is that his presence was necessary to a decision favorable to the Tax Commissioner. It is true that the Constitution of Ohio provides that a majority of the court, namely four members, are necessary to pronounce a decision. Manifestly it does not

follow from that provision that the disqualified judges are required to sit in order to make up a quorum.

It has many times happened in Ohio that a single member of the court has believed himself to be disqualified and did not participate, and that the remaining six members were equally divided, thereby resulting in a failure to render any judgment.

After Judge Hart frankly recognized his disqualification, there still remained six judges. Surely it could not be known at that time how the judges would vote and there would still remain five judges to consider and act upon the case if Judge Turner had retired.

The Tax Commission had a right under the constitution, subject to the limitation pointed out on page 13, our petition, after the adverse judgment of the Court of Appeals, to perfect an appeal from the Court of Appeals to the Supreme Court, but neither the Constitution of Ohio nor the Federal Constitution contains any guaranty that the Supreme Court of Ohio will render a judgment either of affirmance or of reversal. As a matter of fact, the Constitution of Ohio makes provision for a tie vote in which event the failure to reach a judgment, either of affirmance or reversal, will be considered as an affirmance.

There have been many cases submitted to the Supreme Court of Ohio since the constitutional amendments of 1913 wherein the Supreme Court has failed to render final judgment for that reason, and surely this case should not be made an exception to a well settled rule.

We repeat that what the respondent really desires is to have Judge Turner participate in the case because with his participation they have one more favorable vote which assures to them a favorable judgment.

Surely there is nothing about the facts of this case which puts it in a class by itself and makes it important to defeat the ends of justice by preventing sales tax collectors being required to pay into the state treasury taxes collected from their customers, the consuming public.

#### 4. WAS THERE ERROR IN THE DECISION OF THE COURT BELOW?

The first proposition advanced by opposing counsel on this point is that the writ of mandamus cannot be invoked to control official discretion. No authority need be cited on this point, and we will freely concede that bald proposition. Our contention is that it has no application to this case.

The duty devolves upon the Tax Commissioner to "enforce and administer the provisions of this act." (Sec. 5546-5 G. C.) Manifestly it follows that it is his plain duty to prevent evasion of the law and to protect the public revenue.

Section 5546-9a declares the personal liability of any vendor who fails to collect the sales tax or to faithfully account for taxes collected by him. That section further makes it the duty of the Tax Commissioner "to make an assessment against such vendor based upon any information within its possession or that shall come into its possession." The question arises therefore whether there was any information in the possession of the Commissioner which called upon him to act. The Court of Appeals has found that the reports of these vendors, supplemented by the voluminous audit made by accountants employed by the Commission, showed an evasion and further showed the amount of the evasion. It was upon this finding of fact that there was information in the possession of the Tax Commissioner which required him to further proceed, that the Court of Appeals issued the order of mandamus to perform a specific duty and to compel him to levy a tentative assessment, thereby placing upon these two vendors the burden of proof to show that they had properly accounted. These two vendors then had the opportunity to petition for a reassessment and to make a full inquiry as to their accounting and later if desired by them to appeal to the courts. All of these rights were guaranteed to vendors by the act itself.

At page 3 of our former brief, we quoted the statute which creates a presumption that all sales are subject to the tax until the contrary is established. The dissenting opinions in the Supreme Court were based upon this provision of the law and upon the presumptions thus created. It is plain therefore that the judgment of the Court of Appeals does not interfere with the discretion of a public official, and it is equally plain that the writ is directed to the performance of an act which is especially enjoined by law. Without repeating the arguments of our former brief, we desire to call the Court's attention to our petition and brief where all of these matters are more fully discussed.

Opposing counsel have sought to make a feature of an earlier case involving in part the same facts but upon different issues in a different court and between different parties. That case was *State ex rel. Foster vs. Miller*, 136 O. S. 295. It is now contended that that case is *res judicata* of this present controversy. We are sure that if this present appeal were being argued by Mr. Linton, former counsel for one of these vendors and who did conduct the trial in the Court of Appeals and who later argued the case in the Supreme Court, were now conducting this appeal, he would not have raised that question. He would have remembered that which this record clearly shows that when this present suit was filed in the Court of Appeals, Mr. Linton pleaded *res judicata* and in support of it pleaded the case reported in 136 Ohio State. The Court of Appeals tried that issue in advance of the trial and the other issues in the case and found that it was not *res judicata* and no appeal was taken from that judgment and the question of *res judicata* became a finality. On this point we refer the Court to the opinion of the Court of Appeals and especially to page 61 of the appendix to our former brief at the last paragraph of that page. *Res judicata* as such was not even argued on the appeal to the Supreme Court of Ohio.

The respondent says :

“A decision resulting in a deficiency \* \* \* assessment \* \* \* for the year 1935 could not have affected Judge Turner's interest \* \* \* because the amount of gross sales would have remained the same (p. 12 Brief) \* \* \* and his rental \* \* \* the same.”

“A deficiency assessment might have reduced the net profits \* \* \* but Judge Turner's rental being based on a percentage of gross sales, would not have been affected by a reduction of net profits.” (p. 6 Respondent's Brief.)

That argument is ingenious. It is clearly established that their gross receipts from sales were augmented by mingling the tax collections with sales receipts, keeping no records and not accounting for the same. Judge Turner received in 1935 and every year thereafter, his monthly percentage of those taxes illegally withheld. If an assessment is made against Kroger it is then established that Judge Turner has been paid a share of those taxes. His decision and the judgment prevent the state from making an assessment therefor, where they refuse to keep records and the state cannot prove each specific sale, and cannot apply the rules and regulations lawfully adopted to meet such a situation.

Judge Turner's “conclusions” and the judgment prevent that.

If the assessment is made against Kroger, then Kroger would have an action against Judge Turner to recover that portion of the percentage paid him, which represents receipts or “net profits” so called, in excess of the amount received from the sale of merchandise.

Judge Turner, under such a situation, could not in good conscience retain that money. But his conclusions, decision and the judgment, admittedly, have resulted in stripping the state of all remedy to recover that money, or the amount represented thereby, in violation of the 14th Amendment, as pointed out in 281 U. S. 682, p. 2, our peti-

tion. This is the same principle set out in *Truax vs. Corigan*, 257 U. S. 312.

Therefore, it is clear, a federal right of controlling importance was seasonably set up and argued, considered, and denied and that this Court does have jurisdiction. Therefore we believe this writ should be allowed.

Respectfully submitted,

MATTHEW L. BIGGER,

*Attorney for Petitioner,*

50 E. Broad St.,  
Columbus, Ohio.

